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IN THE

Supreme Court of the United States

October Term, 1957.
No. 726.

M. ALEXANDER FORMAN and BETTY FORMAN, his wife, *Appellants*,

vs.

Irwin Apfel, Liquidating Receiver of Self Drive It Corporation and Richard S. Robinson, Petitioning Shareholder,
Appellee.

BRIEF OF APPELLANTS OPPOSING APPELLEES' ALTERNATIVE MOTION UNDER RULE 16, TO DISMISS OR AFFIRM.

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF OPPOSING APPELLEES' ALTERNATIVE MOTION UNDER RULE 16, TO DISMISS OR AFFIRM.

STATEMENT OF THE CASE.

The Appellants file this Brief under Rule 16(3) of this Court opposing the Appellees' motion for the reasons set forth herein. For brevity the said motion is hereafter referred to as the Motion To Dismiss.

The Appellants' appeal raised the constitutional question that the appointment of the original receivers upon an unsupported, ex parte petition, allowed in chambers without notice or opportunity to be heard was without due process.

The Appellees' Motion To Dismiss alleges that there was due process in appointing the temporary co-receivers for the solvent going corporation upon petition of a minority stockholder. The Motion To Dismiss also alleges that a shareholder consented to the appointment of a liquidating receiver at a hearing which they assert was held to afford the due process necessary to the constitutional appointment of the original, i. e. the first temporary co-receivers and that this alleged consent of a mere stockholder validated the unconstitutional appointment of receivers, and was binding on the corporation.

This hearing, including its continued hearing, was the only hearing at which evidence was received on any subject or for any purpose. It was not held until twenty-eight days after the original co-receivers were appointed without notice or opportunity to be heard, ex parte, in chambers, upon unsupported petition of a stockholder of forty-nine and one-half (49½) percent of the shares, and the receivers after being in possession twenty-three days filed report recommending a liquidating receiver be appointed.

This brief of the Appellants in reply to the Motion To Dismiss, etc., shows:

(a) There was no due process since the original order appointing receivers was in chambers, without notice or opportunity to be heard.

(b) There was never any hearing on the original petition.

(c) The only hearing was upon recommendation of the original receivers made twenty-three days after they were appointed by an unconstitutional procedure, and the hearing was twenty-eight days after their appointment.

(d) There was no consent to the appointment of a liquidating receiver.

(e) A stockholder cannot bind the corporation even had he consented to appointment of a receiver for the solvent corporation.

(f) The appeal from the appointment of receivers for a solvent going corporation without due process should be heard and the constitutional question raised by this appeal should be decided and the judgment of the Supreme Court of Pennsylvania should be reversed and this Motion To Dismiss should be denied.

The Appellants first show that the Statement of Facts made in Appellees' Motion to dismiss does not contain all the facts and is inaccurate in certain respects.

In Paragraph 2, page 2, of the Motion To Dismiss, the Appellees have failed to inform the Court that the Petition filed by Richard S. Robinson, the petitioning stockholder:

(a) was sworn to by him but contained no supporting affidavits (Record pp. 8a-9a).

(b) that the petition was presented to a Common Pleas judge in chambers, who forthwith allowed the petition, appointed receivers for the solvent going corporation with "authority to operate the business of Self Drive It Corporation, for a period of sixty days, subject to further order of the Court. That the Court *shall . . . fix* a date for hearing . . . and *at such time . . .* make its determination upon the appointment of a *permanent* receiver as the Court may *thereupon* determine" (pp. 8a-9a).

(c) that the corporation was a solvent going corporation and the report of the receivers so showed the Court (pp. 11a-12a). Its assets eventually were bought for $673,000 (Appellees' Motion To Dismiss, paragraph 12, page 5). It had earned $26,000 before taxes in 1956 (pp. 11a-12a).

(d) that the Appellants, the stockholders owning fifty percent of the stock of the solvent going corporation had no notice or opportunity to be heard, nor did the solvent going corporation, as such, but the receivers immediately took possession of the corporate assets.

(e) the receivers were "authorized to borrow" up to $75,000 to continue to operate the going business (p. 6a) until the Court could ". . . make its determination upon the appointment of a *permanent* receiver . . ." (p. 7a). The future determination was not to be a "liquidating receiver".

(f) under the statute here attacked, i. e., the Business Corporation Law of Pennsylvania, 15 Purdon Statutes 2852, there cannot be a "permanent receiver". Under that Act, there can be only a petition for "winding up and dissolution of the corporation". See Act quoted in Appendix to "Jurisdictional Statement" p. 19 thereof.

(g) that the Court appointing the original receivers and later holding the hearing on the recommendation of the original receivers, considered the proceeding one for a *permanent* receiver until (p. 35a) at the last minute before appointing the liquidating receiver:

"THE COURT: This is a hearing, a continued hearing, *is it not*, on a petition to have a *permanent* receiver appointed?

MR. MILLER: Yes, sir.

MR. JONES: That is right . . .

MR. MILLER: If it pleases your Honor, *although* the term '*permanent* receiver' is used, we speak of a 'liquidating receiver' within the purview of the Business Corporation Act of 1933, Sections 1107 and 1108."

(h) the prayer of the ex parte petition asked only the appointment of a "receiver" (p. 10a) without specifying whether he should be a permanent or liquidating receiver (p. 10a) and the petition did not say it was under the Business Corporation Act. The first time any designa-

tion of the kind of a receiver was made was as quoted immediately above, and the judge, petitioners' counsel and appellants' counsel were considering a "permanent receiver" until petitioners' counsel said as above that "although the term 'permanent receiver' is used, we speak of a 'liquidating receiver' within the purview of the Business Corporation Act . . ." Therefore, for the first time on November 28, 1956, more than a month after the original receivers were appointed ex parte, it was stated a liquidating receiver was being "spoken of" (p. 33a).

(i) that counsel for the appellants did not consent to the appointment of a liquidating receiver, but said (p. 35a) . . . "events . . . had led me and my client to agree and say . . . that we should do nothing further but agree to the court appointing a permanent receiver and move on from that point" . . .

(j) that thereafter motion was filed to quash the entire proceeding as unconstitutional.

ARGUMENT.

(1) THERE WAS NO DUE PROCESS.

There was no due process because there was no notice of the petition for appointment of temporary receivers and no opportunity to be heard thereon.

The appeal here is upon the constitutionality of the original appointment of temporary receivers for the solvent going corporation, upon an ex parte, unsupported petition in chambers, without notice or opportunity to be heard and contends this was and is a denial of due process under the Constitution of this United States, the Fourteenth Amendment thereto.

As set forth in the Jurisdictional Statement (inter alia

p. 14) the appointment of the receivers of the solvent going corporation, without notice and opportunity to be heard was, and is, null and void, since the unconstitutional act is not a law; conferred no right; imposed no duty; afforded no protection; and is in legal contemplation as inoperative as though it had never been passed, and hence any subsequent action of a party could not and did not give the first void order of the court appointing the receivers life and validity. *Norton v. Selby*, 6 U. S. S. Ct. 1121. The argument of the Jurisdictional Statement is not here repeated.

(2) THERE WAS NEVER ANY HEARING ON THE ORIGINAL PETITION, AND THE ONLY HEARING WAS UPON THE RECOMMENDATION OF THE RECEIVERS THAT A LIQUIDATING RECEIVER BE APPOINTED.

It is emphasized, by quoting the words of Appellees' Motion to which this Brief is opposed, and from paragraph (5) page 3 thereof that—"the Court, upon consideration of the report and inventory . . . of the temporary *co-receivers*, filed November 15, 1956, *ordered* that a hearing be held . . . on November 21, 1956 for the purpose of determining whether or not a liquidating receiver should be appointed." This was twenty-three days after the appointment of the receivers.

This statement in the words of Appellees' Motion clearly confirms as stated by Appellants on page five (5) of the "Jurisdictional Statement". "The initial proceeding on which the entire case depends was in chambers without notice" . . . It was without opportunity to be heard regarding the appointment of original receivers, and the only hearing ever held was on the recommendation of the original receivers, twenty-three days after their appointment, that a liquidating receiver be appointed for the corporation which they also reported was solvent (pp. 11a-12a).

Under the Court's original order, appointing these receivers, the next step would have been the Court's determination of a permanent receiver (p. 7a). No hearing was held under the original order of the Court.

When that hearing was held on November 21, 1956 (p. 13a), it was labeled a "Hearing on Petition for Appointment of Liquidating Receiver."

There was no petition.

The *receivers recommended* liquidating receivers and the Court held a hearing to consider that recommendation.

This was not a petition of any shareholder, creditor, or any other person for appointment of a liquidating receiver.

As stated in Appellees' Motion, which this Brief opposes, in paragraph four (4), page three (3), "On November 16, 1956, the temporary co-receivers filed . . report . . . recommended . . . that a liquidating receiver be appointed . . ."

The hearing thereon was the only hearing on appointment of any receiver.

Counsel for the petitioner Robinson was then acting for the original receivers who made the recommendation. He has continued to act as counsel for the receivers and his name is on the Appellees' Motion To Dismiss, etc., as co-counsel for Robinson, the petitioning shareholder and for the original receivers, who are the Appellees here. It ought to be noticed that counsel for the Appellees filed the report for the receivers, in which the receivers recommended that a liquidating receiver be appointed.

It is therefore an utterly misleading statement that there was any hearing except the hearings held on the original receivers' recommendation that a liquidating receiver be appointed, and this recommendation was made by these receivers twenty-three days after they were appointed.

This hearing was continued after partial hearing on November 21, 1956, to November 26, 1956, as shown by p. 35a of the Record as printed in the Supreme Court of Pennsylvania.

The only hearing therefor was on this recommendation of the original receivers that a liquidating receiver be appointed for the solvent going corporation, and not upon petition.

(3) THERE WAS NO CONSENT TO THE APPOINTMENT OF A LIQUIDATING RECEIVER.

It is believed that it is necessary only to quote the record (verbatim) as to that which the Appellees in their Motion To Dismiss, say was consent to the appointment of a liquidating receiver to show there was no such consent. It is reported p. 35a of the record as printed in the appeal in the Supreme Court of Pennsylvania, as follows:

> "THE COURT: This is a hearing, a *continued* hearing, is it not, on a petition to have a *permanent* receiver appointed?
>
> MR. MILLER: Yes, sir.
>
> MR. JONES: That is right ——"

At this point, Court and all counsel were of one mind and present for the Court's action regarding a *permanent* receiver, as ordered when receivers were first appointed (p. 7a).

It was at that point counsel for Appellants said—"Events after that (i. e. the date of the hearing of which this was the continued hearing) . . . had led me and my client to agree and say to the Court that we should do nothing further but agree to the Court appointing a *permanent* receiver *and more on from that point*" (p. 35a).

It was immediately after these words that the following transpired:

> MR. MILLER: If you please, your Honor, although the term *permanent* receiver is used, *we speak of a liquidating* receiver within the purview of the Bus-

ness Corporation Act of 1932, Sections 1107 and 1108" (p. 35a).

Appellants' counsel said nothing after this.

The Court *immediately* appointed a *liquidating* receiver, as had been recommended by the original receivers.

The Appellants moved on from this appointment of a "liquidating" receiver by filing within seven business days their petition to quash the entire proceeding as . . . "unconstitutional since the said act violates the Fourteenth Amendment of the Constitution of the United States, providing inter alia . . . 'nor shall any state deprive any person of . . . property without due process of law . . .'" (pp. 36a-37a Record Below).

The Appellants did not agree to a "liquidating receiver". They said ". . . agree to the Court appointing a *permanent* receiver and *move on from that point*". Yet this is the exact language which appellees say consented to a "liquidating receiver".

The present appellants moved to quash the proceedings as unconstitutional. When that Motion was dismissed, the present Appellants appealed to the Supreme Court of Pennsylvania, but Appellees proceeded with the sale of the corporate assets.

The Appellants thereafter bid for the assets. Counsel for Appellees will not deny that a "straw" for Appellees bid in the assets and Robinson today operates the same business in the same building and premises, under the same name.

The result accomplished by Robinson is to have ousted the Formans from their one-half ownership of the Self Drive It Corporation which *business he now operates*.

ANSWERING SPECIFICALLY THE EIGHTEENTH (18) PARAGRAPH OF THE APPELLEES' MOTION, PAGE SIX (6), WHEREIN THEY SET FORTH THEIR REASONS WHY THE APPEAL SHOULD BE DISMISSED.

Appellees say (paragraph 18a, page 6 of Appellees' Motion To Dismiss):

"Appellants having once given express consent in open court to the appointment of a liquidating receiver, at a hearing held for the express purpose, they thereby consented to the appointment of a liquidating receiver . . ."
"Appellants, by their consent and acquiescence to the appointment of the liquidating receiver induced the court to take the action of which they now complain . . ."

The Appellants reiterate, the purpose of the only hearing ever held was to consider the original receivers' recommendation for a liquidating receiver as shown above.

It was not until the Court had said "permanent receiver" and counsel for receivers and Mr. Robinson had said "Mr. Miller: Yes, sir" (p. 35a) and counsel for the Appellants, "Mr. Jones: That is right . . ." that Mr. Miller then switched to say liquidating receiver by saying (p. 35a) ". . . Although the term 'permanent' receiver is used, we speak of a 'liquidating' receiver within the purview of the Business Corporation Act . . ."

There has not been and counsel for Appellees has not and cannot point to one word of what he states was . . . "consent to the appointment of the liquidating receiver", than that which is quoted above, and that is not such consent.

It simply was not so "consented to". The allegation is a bland misstatement of fact in face of the following record facts:

On October 24, 1956, the Court, upon an ex parte, unsupported petition, in chambers, appointed receivers to operate the affairs of the solvent going business for sixty days when it would make its determination upon the appointment of a permanent receiver (pp. 6a and 7a of record below).

These temporary receivers took over before the corporation or the Appellants who owned fifty percent of the stock had notice or opportunity to be heard.

Thereafter, these receivers filed a report on November 15, 1956, in which these *receivers recommended* that the corporation be liquidated (Appellees' Motion To Dismiss, paragraphs 4 and 5, page 3).

Counsel for the petitioning stockholder Robinson had been appointed counsel for the receivers and the report and recommendation for liquidation was filed by him on behalf of the receivers.

There was never any *petition* for appointment of a liquidating receiver filed. The receivers' recommendation in this respect was acted upon, and this is stated, verbatim, in Appellees' Motion To Dismiss, etc. paragraph five (5), page three (3) ". . . *the court upon consideration of the report . . . ordered* that a hearing be held . . . November 21, 1956, for the purpose of determining whether or not a liquidating receiver should be appointed."

It is this mislabeled hearing which the Appellees in that part of their Motion To Dismiss (quoted above) say was ". . . a hearing *held for the* express *purpose of affording due process* (paragraph 18(a), pp. 6 and 7 of Motion To Dismiss to which this brief is a reply).

Such averment in the Motion To Dismiss is certainly indicative there had not been any prior hearing which had afforded due process.

It is the assertion that a hearing held on the recommendation for the appointment of a liquidating receiver, was to afford and did afford the due process necessary to the constitutional appointment of the original receivers, who had

acted as receivers for twenty-three days and had then recommended a liquidating receiver.

The Appellees state in paragraph 18(d), page 8 of their Motion "This is distinguished from *Nottebaum vs. Leckie et al*, 31 F. 2d 556, for . . . court . . . appointed permanent receivers and granted an absolute injunction in ex parte proceedings, without opportunity to the defending parties to be heard or without provision for a hearing to be held." "In the instant case the Lower Court *ex parte* appointed Temporary Receivers until a hearing be held. This was not a final decree. That on a date fixed by the Lower Court hearings were held (Same are fully referred to in this brief)" (verbatim from Appellees' Motion To Dismiss).

But the only hearing was on the original receivers' recommendation, as shown, supra.

It will not escape the Court that Appellees say "(Same are fully referred to in this brief)" but that they do not cite the page of the record or refer to it so the alleged hearing can be identified, and that is because the only hearing ever held was November 15, 1956 . . . "the court upon consideration of the report (of the already functioning receivers) . . . ordered that a hearing be held on . . . November 21, 1956 for the purpose of determining whether or not a liquidating receiver should be appointed." (Verbatim from paragraph five (5), page three (3) of Appellees' present Motion To Dismiss, etc.).

STATEMENTS FROM APPELLEES' MOTION TO DISMISS, ETC. ARE LAID SIDE BY SIDE TO SHOW THE DUPLICITY OF THE AVERMENTS.

In paragraph four (4), page three (3) of "Appellees' Alternative Motion Under Rule 16 To Dismiss or Affirm" to which this brief is opposed the Appellees say to this Court:

> "4. On November 15, 1956 the temporary co-receivers filed a full and complete report . . . in which they recom-

mended . . . that a *liquidating* receiver be appointed with full powers . . . to liquidate the assets of the subject corporation.

5. That on the *same date* November 15, 1956, the court upon consideration of this report . . . ordered a hearing to be held . . . November 21, 1956, for the purpose of determining whether or not a *liquidating* receiver should be appointed."

But Appellees also state:

Page six (6), Appellees' Motion To Dismiss, etc. "18(a) Appellants having once given express consent in open court to the appointment of a liquidating receiver *at a hearing held for the express purpose of affording due process*, etc. etc."

Page seven (7), "18(c) The record discloses that on November 15, 1956, the Common Pleas Court fixed a hearing on the *merits* of the *stockholders' petition* to be held on November 21, 1956, etc. etc."

There was no stockholders' petition, upon which any hearing was held, supra.

There was a receivers' recommendation that a liquidating receiver be appointed upon which the hearing was held.

The Appellees' Motion To Dismiss, etc. in paragraph 18(d), page seven (7), says:

"The order of the Court of Common Pleas No. 1 . . . appointing the temporary receivers provides . . . that the court shall pursuant to order fix a date for hearing upon this petition . . ." but the Appellees with utter disregard for the exact and full order fail to quote it in full (from page 7a of the record below) as follows:

"That the court shall, pursuant to order, fix a date for a hearing upon this Petition, and, at such time upon the petition and facts and full hearing held thereon, make its determination upon the appointment of a *permanent*

receiver for such purpose as the court may thereupon determine."

The Court never fixed a date "for a hearing upon this petition". It held a hearing as has been pointed out several places and times above in this brief and in the words of appellees' Motion To Dismiss, etc. paragraphs 4 and 5, page 3: "On November 15, 1956, the temporary co-receivers filed a . . . report . . . in which they recommended . . . that a liquidating receiver be appointed . . . * * * That on the *same date* November 15, 1956, the court, upon consideration of the report . . . of this temporary co-receivers, ordered that a hearing be held . . . on November 21, 1956, for the purpose of determining whether or not a liquidating receiver should be appointed."

After failing to quote the full order in paragraph 18(d) the Appellees continue with this assertion at top of page seven (7) of their Motion to Dismiss, etc.:

"This is distinguished from the case of *Nottebaum vs. Leckie et al*, 31 F. 2d 556 . . . etc. etc."

It is unquestioned that case will be read by those reviewing this brief. It required seven pages to report it in the Federal Reports. It obviously need not be copied here in full.

It is not "distinguished" from this case.

It is on all fours with this case. There was petition in a United States District Court under the New Jersey General Corporation Act with almost identical proviso as the Pennsylvania Business Corporation Act, here attacked. The petition asked for receiver for an alleged *insolvent* corporation. It was allowed on petition in chambers without notice and opportunity to be heard. The receivers were appointed "until further order of the court", 31 F. 2d 558. The same injunction and orders to restrain and compel delivery of assets were there decreed, as here.

"The receivers were further authorized to take complete control and possession . . . and to operate and manage the business . . ." just as here. 31 F. 2d 558.

"The defendant had no notice or knowledge of these proceedings until the receivers arrived with the court's decree appeared and . . . ousted defendant . . . took full possession of its property, assets and business" as here.

"What, then, is the legal situation. On presentation of the bill and affidavit the court passed summarily on the case so presented, and finding the facts there asserted to be true, appointed receivers, which immediately and of itself divested the defendant of all its property. This was a final decree." 31 F. 2d 559. As here it, also, was and is.

"Nottebaum's affidavit was filed in his own behalf" 31 F. 2d 561, just as is the Forman action here.

"He had no authority or legal right to act for the company and did not undertake to do so. *His individual action, can in no sense be construed as a corporate action. What he did, or neglected to do, cannot bind the corporation.* In passing on the affidavits and entering the order August 6, 1923, continuing the receivers, the rights of the corporation in its property, its business and its franchises, were in no way altered . . . No act had been done (i. e. by Nottebaum and others in contesting the taking of the corporate assets, comment in this parenthesis supplied) which could give it life, or estop the defendant from asserting its invalidity" 31 F. 2d 561.

Foremans, the Appellants, here, are stockholders, they cannot bind the corporation. Nothing they can do in contesting this unconstitutional taking of the corporate assets, by agreeing to a permanent receiver or any other act, can estop the assertion of the invalidity and make it constitutional.

Enough has been quoted to show the court the case of *Nottebaum v. Leckie* and this case involved almost identical factual situations and certainly the same legal question of constitutionality is raised.

The decision in *Leckie v. Nottebaum* and in this case are conflicting decisions of the Third Circuit Court and the Supreme Court of Pennsylvania in the same judicial district, on substantial questions.

A SHAREHOLDER CANNOT BIND THE CORPORATION.

Appellees' paragraph 18(e), page eight (8) of their Motion To Dismiss, etc. again says that there was consent to appointment of a liquidating receiver and implies that a shareholder can consent to such appointment on behalf of the corporation, and that by so doing, the shareholder can give validity to the unconstitutional appointment of receivers.

The shareholder cannot bind the corporation. 31 F. 2d 556, 561, as quoted above from *Leckie v. Nottebaum.*

The shareholder cannot give validity to a null and void unconstitutional act of any state. That is the ultimate holding of *Leckie v. Nottebaum*, 31 F. 2d 556.

REPLY TO THE APPELLEES' RECAPITULATION OF ITS REASONS TO DISMISS; IS AS FOLLOWS AND TO EACH REASON AS NUMBER AT THE BOTTOM OF PAGE TEN AND TOP OF PAGE ELEVEN OF THE APPELLEES' MOTION TO DISMISS.

Reply to 1: The original appointment of temporary receivers was *not* with notice and opportunity to be heard. It was ex parte, in chambers, without notice. The order itself took the corporate assets and property, vested it immediately in the receivers, who took charge of the property and business forthwith and no opportunity to be heard was allowed. Supra.

Reply to 2: The order of October 24. 1956, appointing the temporary receivers until further order of the court was as said in *Nottebaum v. Leckie, et al*, 31 F. 2d 556. page 559: "On the presentation of the bill . . . the court passed summarily on the case so presented . . . appointed receivers; which immediately *and of itself*, divested defendant of all its property. *This was a final decree.*"

Reply to 3: The Appellants are shareholders. They did not consent to a liquidating receiver or to liquidation as shown hereinabove. Had they done so, such consent could not bind the corporation, nor validate a null and void unconstitutional act and order of the court predicated on and under such act or law. 31 F. 2d 556, as quoted supra.

Reply to 4: The record does not disclose that Appellants gave their express consent in open court to the appointment of the liquidating receiver at the hearing held for the express purpose of affording due process. It shows the contrary and moreover even if given by a stockholder, it cannot bind the corporation.

There was never any notice or hearing on the original petition appointing receivers. The only hearing ever held was on the recommendation of the receivers appointed without notice at hearing, some twenty-three days after their appointment, and such a hearing could not and did not supply the due process of notice and opportunity to be heard as to their appointment. Supra.

Reply to 5: The constitutionality of the Business Corporation Law of Pennsylvania, specifically Sections 1107, 1108. Act of May 5, 1933, 364, 15 P. S. 2852, is in issue, placed in issue by the petition to quash (pp. 36a-37a of the record below). It was passed upon by the Supreme Court of Pennsylvania, which held the alleged consent of a stockholder made valid the unconstitutional act and action of the court in appointing receivers for a solvent going corporation. It is the question here presented on the appeal filed from the Supreme Court of Pennsylvania. Supra.

The Appellants therefore urge the Court to refuse the "Appellees' Alternative Motion Under Rule 16, To Dismiss or Affirm" and to hear the constitutional question raised by the appeal and stated in the Jurisdictional Statement heretofore filed.

Respectfully submitted,

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